THE STATE BAR
OF CALIFORNIA
180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

COMMISSION FOR THE REVISION OF THE
RULES OF PROFESSIONAL CONDUCT
TELEPHONE: (415) 538-2161

DATE: March 3, 2009

TO: Governor Howard Miller

FROM: Harry Sondheim, Chair, Commission for the Revision of the Rules of Professional Conduct

SUBJECT: Request to Recommend, on an Expedited Basis, an Amendment to the California Rules of Professional Conduct that Adopts the Policy of ABA Model Rule 6.5 ("Nonprofit and Court-Annexed Limited Legal Services Programs")

SUMMARY OF RECOMMENDATION

In response to the subject request, the Commission recommends that the Board of Governors ("Board") consider adopting a proposed new Rule as an amendment to the California Rules of Professional Conduct ("California Rules"). Two alternative versions of the rule are submitted herewith. (See Enclosure 1 for ALT #1 of a proposed rule presented as a clean draft, an annotated draft with explanatory footnotes, and a comparison draft showing changes to ABA Model Rule 6.5. See Enclosure 2 for ALT #2 of a proposed rule presented as a clean draft, an annotated draft with explanatory footnotes, and a comparison draft showing changes to ABA Model Rule 6.5.)

BACKGROUND & DISCUSSION

At the Commission's February 20, 2009 meeting, the Commission was informed that the Board was interested in considering an amendment to the California Rules of Professional Conduct that adopts the policy of ABA Model Rule 6.5 ("Nonprofit and Court-Annexed Limited Legal Services Programs"). In addition, the Commission was informed that there was an interest in facilitating promulgation of such an amendment on an expedited basis.[1]

Following discussion at the February 20th meeting, the Commission prepared two alternative proposed rules and circulated the rules for an expedited ballot process. Each alternative

[1] During the discussion it was noted that the Commission's assistance to the Board on an expedited rule amendment should not hinder the Commission's continued efforts to develop a separate proposal based on ABA Model Rule 6.5 that comports with its overall effort to recommend comprehensive rule amendments.

contained proposed rule text and proposed discussion section text.[2] Commission members were asked to register their vote to approve either, both, or neither of the alternative rules. In addition, the Commission members were asked to separately vote on the respective discussion sections of each alternative rule. In other words, a Commission member could vote in favor of a rule alternative but reject that rule's discussion.

The principal difference between the two alternatives is in the language used to describe how the prohibitions on conflicts are loosened to permit a lawyer's participation in the kinds of programs contemplated under the proposed rule. One rule, ALT1, expressly refers to the broad consequences of "disqualification" and "discipline" that typically result from a lawyer's failure to comply with the California Rules governing conflicts of interest, and provides that a participating lawyer is subject to those consequences only if the lawyer "knows" the representation to be undertaken involves a conflict. The other version of the rule, ALT2, narrowly focuses on identifying the standard of compliance without addressing the actual consequences of noncompliance, and simply provides that a participating lawyer is subject to that standard only if the lawyer "knows" the representation to be undertaken involves a conflict.

This difference can be seen by comparing each rule's paragraph (A)(1). In ALT #1, paragraph (a)(1) states that a member participating in a limited legal service program is ***subject to*** "***discipline and disqualification*** under rule 3-310 and case law relating to conflicts of interest ***only if*** the member knows the representation of the client involves a conflict of interest. . . ." (Emphasis added.) In ALT #2, paragraph (A)(1) states that a member participating in a limited legal service program is "***subject to rule 3-310 only if*** the member knows that the representation of the client involves a conflict of interest. . . ." (Emphasis added.).

This seemingly slight difference in approach results from a significant policy difference between the current California Rules and the ABA Model Rules. The purpose of the California Rules is to regulate the professional conduct of members through discipline.[3] In contrast, the ABA Model Rules contain a variety of lawyer conduct standards, some of which are imperatives and are intended to be enforced through a lawyer discipline system, while others are descriptive statements of a lawyer's professional role and general obligations,[4] the violation of which might have a non-disciplinary consequence such as disqualification.[5]

On the one hand, the key advantage of ALT #1 is that it directly addresses the concerns of lawyers who contemplate participating in a limited legal services program about the risk of a disqualification arising from that participation. A minority of the Commission believes that

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[2] California Rule 1-100(C) provides: Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussions of the rules, while they do not add an independent basis for discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them."

[3] See Rule 1-100(A) regarding the "Purpose and Function" of the California Rules.

[4] See ABA Model Rules, Scope, paragraph [14] (the ABA Model Rules are "partly obligatory and disciplinary" and "partly constitutive and descriptive").

[5] See ABA Model Rules, Scope, paragraph [20] (a rule violation does not "necessarily" warrant remedies such as "disqualification of a lawyer in pending litigation").

minimizing unnecessary risk is the crux of ABA Model Rule 6.5 and that expressly stating this access to justice objective in the rule's language overrides any other concerns, including perceptions about the intended purpose of the California rules, as discussed below.

On the other hand, the key advantage of ALT #2 is that its narrower wording does not preempt the debate, not yet resolved by the Commission (or the Board or the Supreme Court), on whether the California Rules on conflicts of interest should continue to be exclusively rules of discipline, rather than rules of general application that also apply to non-disciplinary settings, such as civil disqualification proceedings. A majority of the Commission concedes that a lawyer's violation of a conflicts rule is properly a factor to consider in a trial court's decision to grant a motion to disqualify a lawyer or law firm and, in fact, has been so considered by the courts. However, they believe that the rule itself should not purport to mandate when disqualification is appropriate, as that could inappropriately usurp a trial court's exercise of discretion that emanates from its inherent authority to control the lawyers appearing before it.

Another difference between the two alternatives that is related to the foregoing divergent functions of the Model Rules and the current California Rules is found in the language used to describe the scope of the law of conflicts being loosened to permit lawyer participation in limited legal services programs. In part because the California Rules are disciplinary in nature, certain concepts that are found in the Model Rules, such as imputed disqualification, have no counterpart in the California Rules. Instead, in California such concepts have been developed through case law. Therefore, proponents of ALT1 added a reference to "case law relating to conflicts of interest" in addition to referring to rule 3-310, as well as specifying "case law related to imputed conflicts of interest." Those Commission members who favor the addition of references to case law believe it furthers the rule's objective of removing obstacles to lawyers' participation in limited legal services programs by broadening the scope of the conflicts law from which lawyers who comply with the rule are exempted. Those members who favor not mentioning "case law" note that the term is case-specific and would promote uncertainty, which would tend to undermine the rule's objective.

Putting aside the differences between the two versions, it is worth noting that ALT #1 and ALT #2 include both rule text and discussion section text. At the Commission's February 20, 2009 meeting, the Commission voted, by a close margin, to consider an expedited rule *without* any discussion section. However, the lead drafter on the Commission's drafting team recommended that a proposed discussion section be included in the rule submitted to the Board so that the Board, itself, can decide whether to include the discussion section. Not all of the drafting committee members agree with this recommendation. Commission members who favor inclusion of a discussion section argue, in part, that the explanatory information is important guidance that: (1) informs lawyers about the scope of the rule and the rationale underlying it; and (2) gives additional instructions on acting in compliance with the rule. Commission members who oppose the inclusion of a discussion section argue, in part, that: (1) the ABA Model Rule language, upon which the proposed discussion section is based, is unnecessary to effectuate the purpose of the rule; and (2) is confusing and potentially imposes disciplinary standards and civil standards of care inconsistent with the California law because it describes obligations addressed in ABA Model Rules that have no California Rule counterpart. The ballot circulating the two alternative versions of the proposed rule asked the Commission members to specifically vote on the issue of including a discussion section. Commission members were told

they could approve both rules, one rule and not the other or neither rule, i.e. they were not required to choose between the rules although they could, if they wished, do so.

In addition to the issues described in the ballot, an issue has been discussed as to where in the California Rules the rule ultimately adopted should be placed. Some Commission members believe it should be placed after rule 1-600 and designated rule 1-650 because the proposed rule encompasses aspects of legal services programs that are the subject of 1-600. Other members believe it should be placed in Chapter 3, perhaps as rule 3-315 because the proposed rule relates to the possible representation of adverse interests which is the subject of 3-310.

RESULTS OF THE COMMISSION'S VOTE

Thirteen Commission members particicpated in the ballot process. The tally of the votes received on the ballot circulating the two versions of the rules is set forth in the table below. (In addition, a more comprehensive table tallying the votes is provided as Enclosure 3.)

RULE VERSION	ALT #1 (w/ reference to DQ)	ALT #2 (w/o reference to DQ)
VOTING OPTIONS	Approve Rule: 5	Approve Rule: 12
	Object to Rule: 8	Object to Rule: 1
	Approve Discussion: 4	Approve Discussion: 10
	Object to Discussion: 8	Object to Discussion: 2

As indicated in the above table, a majority of the Commission voted for ALT #2 of the draft rule (12 votes) with a discussion section (10 votes), while a minority of the Commission voted for ALT #1 of the draft rule (5 votes) with a discussion section (4 votes). However, consistent with the Commission's plan of making the various options considered by the Commission available for Board review, the full text of both ALT #1 and ALT #2 is enclosed, together with comparison drafts to ABA Model Rule 6.5. (Also, an e-mail message compilation is provided as Enclosure 4 that includes the explanation and commentary of the Commission members who voted on the ballot.)

CONCLUSION

In response to the subject request, the Commission recommends that the Board consider adopting a proposed new Rule as an amendment to the California Rules that may be acted upon while the Commission continues with its project to recommend comprehensive rule amendments. The Board will need to consider (a) which version of the Rule it wishes to adopt, (b) whether that version should have a discussion section and (c) where in the California Rules this version should be placed. The votes of the Commission, as well as the commentary of individual Commission members, may be of some assistance to the Board in making these decisions. Once you have had a chance to review the Commission's report, please call me. The following numbers may be used, in the following order, to reach me: (310) 230-9684; (310) 454-4667; (310) 738-6922. It's quite possible that you might have questions and I welcome the opportunity to speak with you.

Finally, the Commission remains available to the Board to provide any further requested assistance on this matter, including reviewing public comments or testimony, should the Board decide to issue a proposed rule for public comment or conduct a public hearing.

ENCLOSURES

1. Proposed Rule 1-650 [6.5] – ALT #1
   - Clean Version 2
   - Annotated Version w/ Explanatory Notes 4
   - Redline Version, Compared to ABA Model Rule 6.5 8

2. Proposed Rule 1-650 [6.5] – ALT #2
   - Clean Version 14
   - Annotated Version w/ Explanatory Notes 16
   - Redline Version, Compared to ABA Model Rule 6.5 20

3. Comprehensive Voting Tally Chart 25

4. Compilation of E-mail Ballots 27

Enclosure 1

Proposed Rule 1-650 [6.5] – ALT #1
(with reference to Disqualification)

- **Clean Version**
- **Annotated Version w/ Explanatory Footnotes**
- **Redline Version, Compared to ABA Model Rule 6.5**

Rule 1-650 [6.5] Limited Legal Services Programs

(A) A member who, under the auspices of a program sponsored by a court, government agency, bar association, law school, nonprofit organization, or a qualified legal services project within the meaning of Business and Professions Code § 6213(a) provides short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation in the matter:

(1) is subject to discipline and disqualification under rule 3-310 or case law relating to conflicts of interest only if the member knows that the representation of the client involves a conflict of interest; and

(2) is subject to disqualification under case law relating to imputed conflicts of interest only if the member knows that another lawyer associated with the member in a law firm is disqualified by rule 3-310 or case law relating to conflicts of interest with respect to the matter.

(B) Except as provided in paragraph (A)(2), case law related to imputed conflicts of interest is inapplicable to a representation governed by this Rule.

Discussion

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a lawyer-client relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited scope of the representation. If a short-term limited representation would not be reasonable under the circumstances, the member may offer advice to the client but must also advise the client of the need for further assistance of counsel. See rule 3-110. Except as provided in this rule 1-650, the Rules of Professional Conduct and the State Bar Act, including the member's duty of confidentiality under Business and Professions Code § 6068(e)(1), are applicable to the limited representation.

[3] A member who is representing a client in the circumstances addressed by rule 1-650 ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (A)(1) requires compliance with rule 3-310 and case law relating to conflicts

of interest only if the member knows that the representation presents a conflict of interest for the member. In addition, paragraph (A)(2) requires compliance with case law relating to imputed conflicts of interest only if the member knows that another lawyer in the member's law firm is disqualified by rule 3-310 or case law relating to conflicts of interest in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the member's law firm, paragraph (B) provides that case law relating to imputed conflicts of interest is inapplicable to a representation governed by this rule except as provided by paragraph (A)(2). Paragraph (A)(2) requires the participating member to comply with case law relating to imputed conflicts of interest when the lawyer knows that any lawyer in the member's law firm is disqualified by rule 3-310 or case law relating to conflicts of interest. By virtue of paragraph (B), moreover, a member's participation in a short-term limited legal services program will not be imputed to the member's law firm or preclude the member's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with rule 1-650, a member undertakes to represent the client in the matter on an ongoing basis, rule 3-310 and case law relating to conflicts of interest and imputed conflicts of interest become applicable.

Rule 1-650[1] [6.5] [2]Limited Legal Services Programs

(A) A member who, under the auspices of a program sponsored by a court, government agency, bar association, law school, nonprofit organization,[3] or a qualified legal services project within the meaning of Business and Professions Code § 6213(a).[4] provides short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation in the matter:

(1) is subject to discipline and disqualification[5] under rule 3-310[6] or case law[7] relating to conflicts of interest[8] only if the member knows that the representation of the client involves a conflict of interest; and

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[1] **Drafters' Note**: The drafters recommend using the number 1-650, so that the rule follows current rule 1-600 ("Legal Services Programs").

[2] **Drafters' Note**: Because the sponsors of qualifying programs are not limited to nonprofits or courts, we have deleted "Nonprofit and Court-Annexed" from the Model Rule title.

[3] **Drafters' Note**: At the 2/20/09 meeting, the RRC voted 11-0-1 to add this laundry list of organizations qualified to sponsor the programs this rule covers. See 2/20/09 KEM Meeting Notes, III.H., at ¶.8.

[4] **Drafters' Note**: Although we were requested during the meeting to refer to B&P Code §§ 6210 et seq., that citation could be confusing, as those sections are addressed to "Funds For The Provision Of Legal Services To Indigent Persons". Perhaps the better reference is § 6213(a), which provides:

> (a) "Qualified legal services project" means either of the following:
>
> (1) A nonprofit project incorporated and operated exclusively in California which provides as its primary purpose and function legal services without charge to indigent persons and which has quality control procedures approved by the State Bar of California.
>
> (2) A program operated exclusively in California by a nonprofit law school accredited by the State Bar of California which meets the requirements of subparagraphs (A) and (B).
>
> (A) The program shall have operated for at least two years at a cost of at least twenty thousand dollars ($20,000) per year as an identifiable law school unit with a primary purpose and function of providing legal services without charge to indigent persons.
>
> (B) The program shall have quality control procedures approved by the State Bar of California..

[5] **Consltant's Note**: Paragraph (A)(1) goes to a lawyer's *personal* disqualification (Model Rule 1.9(a) addresses situations where the lawyer, not the lawyer's firm, represented a person whose interests are now adverse to the lawyer's client. Compare Model Rule 1.9(b).) In California, the MR 1.9(a) situation is covered under rule 3-310(E), for which a lawyer can be disciplined *and* subject to disqualification. Therefore, I've added both discipline and disqualification to paragraph (A)(1).

[6] **Consultant's Note**: In California, rule 3-310(C) and 3-310(B) cover, at least in part, the conflicts addressed in MR 1.7. Because California does not have MR 3-310(C)(4), which would cover much (but not all) of the balance MR 1.7, we have added the subsequent clause, "case law relating to conflicts of interest."

(2) is subject to disqualification under case law relating to imputed conflicts of interest[9] only if the member knows that another lawyer associated with the member in a law firm[10] is disqualified by rule 3-310 or case law relating to conflicts of interest[11] with respect to the matter.

(B)[12] Except as provided in paragraph (A)(2),[13] case law related to[14] imputed conflicts of interest is inapplicable to a representation governed by this Rule.

The last iteration of the phantom rule 3-310(C)(4) [and corresponding amendment to rule 3-310(C)(3)] would have provided:

(C) A member shall not, without the informed written consent of each client:

* * *

(3) ~~Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.~~ Accept representation of a person or entity the member knows or reasonably should know is an opposing party to a client in a separate matter in which the member or the member's law firm currently represents the client.

(4) Accept representation of a person or entity in a litigation matter in which the member knows or reasonably should know an opposing party is a client of the member or the member's law firm, except as otherwise permitted or required by law.

See 1998 Rule Amendment proposal, available at:
http://calbar.ca.gov/calbar/html_unclassified/3cp9805.html

[7] **Drafters' Note**: The current California Rules of Professional Conduct refer to case law by two phrases, "case law" or "decisional law." We've chosen "case law" for this rule.

[8] **Drafters' Note**: See footnote 6.

[9] **Consultant's Note**: Subparagraph (A)(2) addresses when a lawyer participating in the program is disqualified because the personal disqualification of another lawyer in the lawyer's firm is imputed to the participating lawyer. Because the current California rules do not contain a rule concerning imputation, I've added only disqualification to this subparagraph. *Cf.* paragraph (A)(1) ("is subject to discipline and disqualification"). Note that the imputed disqualification addressed in paragraph (A)(2) runs from the law firm to the participating lawyer. Paragraph (B) addresses the situation of disqualification running from the participating lawyer to the law firm.

[10] **Drafters' Note**: Because the convention in the current California Rules is to refer to "law firm," we've substituted "law firm" for "firm" throughout this rule.

[11] **Consultant's Note**: Although (A)(2) is concerned with imputed disqualification, it is the imputed disqualification of the participating lawyer (by virtue of another lawyer in the law firm being personally disqualified), not the imputation of the participating lawyer's personal disqualification to the law firm. Therefore, I've substituted "rule 3-310 or case law relating to conflicts of interest" for "Rules 1.7 and 1.9(a)." See also footnotes 5 and 6 for an explanation of why I believe the phrase "Rules 1.7 and 1.9(a)" refer to a lawyer's personal disqualification.

[12] **Consultant's Note**: See footnote 9. As already noted, paragraph (B) addresses the imputation of a personal conflict of the lawyer participating in the program (e.g., the lawyer has obtained confidential client information), back to the lawyer's law firm. See MR 6.5, Cmt. [4] ("By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices.")

Discussion

[1][15] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a lawyer-client relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited scope of the representation. If a short-term limited representation would not be reasonable under the circumstances, the member may offer advice to the client but must also advise the client of the need for further assistance of counsel. See rule 3-110.[16] Except as provided in this rule 1-650,[17] the Rules of Professional Conduct and the State Bar Act, including the member's duty

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In addition, paragraph (B) operates to avoid the personal disqualification of ***another*** lawyer who is participating in the program (e.g., from an entirely different law firm) from being imputed to the participating lawyer. See Comment [4] ("Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.")

[13] **Drafters' Note**: The phrase, "except as provided in paragraph (a)(2)," signals to the reader that the doctrine of imputed conflicts applies to a participating lawyer only under the conditions outlined in paragraph (a)(2), i.e., when the participating lawyer ***knows*** that another lawyer associated with the lawyer in his or her law firm is personally disqualified under either 3-310 or case law related to conflicts of interest.

[14] **Consultant's Note**: I'm not sure whether to refer to imputed disqualification as "the doctrine of," "the principle of," or refer to "case law related to imputed conflicts of interest." My preference is probably the latter to maintain consistency with the earlier "case law relating to conflicts of interest."

[15] **Consultant's Note**: I don't see any reason not to adopt MR 6.5, cmt. [1], with only the substitution of our laundry list of qualified sponsor organizations in the first sentence and the deletion of the cross-reference to certain rules at the end of the Comment.

[16] **Consultant's Note**: I recommend retention of the first two sentences of MR 6.5, cmt. [2], as revised. Notwithstanding the brevity of the typical lawyer-client communication under this rule, there is no reason why the program client should not be given the opportunity to withhold informed consent as provided in the first sentence. In addition, in those situations where the lawyer cannot competently give substantive advice on the matter absent an ongoing representation, the second sentence provides important guidance on advising the program client to seek further legal assistance. I've also added a reference to rule 3-110.

[17] **Drafters' Note**: The convention for the current California Rules is to refer to the rule by its number, not "this rule" or "this Rule." Note also that referring to "this rule [number]" is a convention also found in the current rules.

of confidentiality under Business and Professions Code § 6068(e)(1),[18] are applicable to the limited representation.

[3] A member who is representing a client in the circumstances addressed by rule 1-650 ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (A)(1) requires compliance with rule 3-310 and case law relating to conflicts of interest only if the member knows that the representation presents a conflict of interest for the member. In addition, paragraph (A)(2) requires compliance with case law relating to imputed conflicts of interest only if the member knows that another lawyer in the member's law firm is disqualified by rule 3-310 or case law relating to conflicts of interest in the matter.[19]

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the member's law firm, paragraph (B) provides that case law relating to imputed conflicts of interest[20] is inapplicable to a representation governed by this rule except as provided by paragraph (A)(2). Paragraph (A)(2) requires the participating member to comply with case law relating to] imputed conflicts of interest[21] when the lawyer knows that any lawyer in[22] the member's law firm is disqualified by rule 3-310 or case law relating to conflicts of interest. By virtue of paragraph (B), moreover, a member's participation in a short-term limited legal services program will not be imputed to the member's law firm or[23] preclude the member's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.[24]

[5] If, after commencing a short-term limited representation in accordance with rule 1-650, a member undertakes to represent the client in the matter on an ongoing basis, rule 3-310 and case law relating to conflicts of interest and imputed conflicts of interest become applicable.

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[18] **Drafters' Note**: MR 1.6 and 1.9 concern a lawyer's duty of confidentiality to current and former clients, respectively. Accordingly, we've substituted the reference to the State Bar Act and B&P Code § 6068(e).

[19] **Consultant's Note**: I've revised MR 6.5, cmt. [3] to conform to the phrases I substituted previously in the rule itself. I also tweaked it a bit to clarify when (A)(1) applies and when (A)(2) applies.

[20] See footnote 14.

[21] See footnote 14.

[22] **Consultant's Note**: I thought adding the phrase, "any lawyer in" would be a clarifying change.

[23] Consultant's Note: I've added the clause, "be imputed to the lawyer's law firm" to connect the dots that the reason the law firm is not precluded from its representation of any person adverse to a program client is because the doctrine of imputed disqualification is not applicable.

[24] See footnote 12, second paragraph.

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Rule 1-650[1] [6.5] ~~Nonprofit And Court-Annexed~~[2] Limited Legal Services Programs

(~~a~~A) A ~~lawyer~~ member who, under the auspices of a program sponsored by a ~~nonprofit organization or~~ court, government agency, bar association, law school, nonprofit organization,[3] or a qualified legal services project within the meaning of Business and Professions Code § 6213(a)[4] provides short-term limited legal services to a client without expectation by either the ~~lawyer~~ member or the client that the ~~lawyer~~ member will provide continuing representation in the matter:

(1) is subject to discipline and disqualification[5] under ~~Rules~~ rule ~~1.7 and 1.9(a)~~ 3-310[6] or case law[7] relating to conflicts of interest[8] only if the

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[1] **Drafters' Note**: The drafters recommend using the number 1-650, so that the rule follows current rule 1-600 ("Legal Services Programs").

[2] **Drafters' Note**: Because the sponsors of qualifying programs are not limited to nonprofits or courts, we have deleted "Nonprofit and Court-Annexed" from the Model Rule title.

[3] **Drafters' Note**: At the 2/20/09 meeting, the RRC voted 11-0-1 to add this laundry list of organizations qualified to sponsor the programs this rule covers. See 2/20/09 KEM Meeting Notes, III.H., at ¶.8.

[4] **Drafters' Note**: Although we were requested during the meeting to refer to B&P Code §§ 6210 et seq., that citation could be confusing, as those sections are addressed to "Funds For The Provision Of Legal Services To Indigent Persons". Perhaps the better reference is § 6213(a), which provides:

> (a) "Qualified legal services project" means either of the following:
>
> (1) A nonprofit project incorporated and operated exclusively in California which provides as its primary purpose and function legal services without charge to indigent persons and which has quality control procedures approved by the State Bar of California.
>
> (2) A program operated exclusively in California by a nonprofit law school accredited by the State Bar of California which meets the requirements of subparagraphs (A) and (B).
>
> (A) The program shall have operated for at least two years at a cost of at least twenty thousand dollars ($20,000) per year as an identifiable law school unit with a primary purpose and function of providing legal services without charge to indigent persons.
>
> (B) The program shall have quality control procedures approved by the State Bar of California.

[5] **Consltant's Note**: Paragraph (A)(1) goes to a lawyer's *personal* disqualification (Model Rule 1.9(a) addresses situations where the lawyer, not the lawyer's firm, represented a person whose interests are now adverse to the lawyer's client. Compare Model Rule 1.9(b).) In California, the MR 1.9(a) situation is covered under rule 3-310(E), for which a lawyer can be disciplined *and* subject to disqualification. Therefore, I've added both discipline and disqualification to paragraph (A)(1).

[6] **Consultant's Note**: In California, rule 3-310(C) and 3-310(B) cover, at least in part, the conflicts addressed in MR 1.7. Because California does not have MR 3-310(C)(4), which would cover much (but not all) of the balance MR 1.7, we have added the subsequent clause, "case law relating to conflicts of interest."

The last iteration of the phantom rule 3-310(C)(4) [and corresponding amendment to rule 3-310(C)(3)] would have provided:

~~lawyer~~member knows that the representation of the client involves a conflict of interest; and

(2) is subject to ~~Rule 1.10~~disqualification under case law relating to imputed conflicts of interest[9] only if the ~~lawyer~~member knows that another lawyer associated with the ~~lawyer~~member in a law firm[10] is disqualified by ~~Rule~~ rule ~~1.7 or 1.9(a)~~ 3-310 or case law relating to conflicts of interest[11] with respect to the matter.

(~~b~~B)[12] Except as provided in paragraph (~~a~~A)(2),[13] ~~Rule 1.10~~case law related to[14] imputed conflicts of interest is inapplicable to a representation governed by this Rule.

(C) A member shall not, without the informed written consent of each client:

* * *

(3) ~~Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.~~ Accept representation of a person or entity the member knows or reasonably should know is an opposing party to a client in a separate matter in which the member or the member's law firm currently represents the client.

(4) Accept representation of a person or entity in a litigation matter in which the member knows or reasonably should know an opposing party is a client of the member or the member's law firm, except as otherwise permitted or required by law.

See 1998 Rule Amendment proposal, available at: http://calbar.ca.gov/calbar/html_unclassified/3cp9805.html

[7] **Drafters' Note**: The current California Rules of Professional Conduct refer to case law by two phrases, "case law" or "decisional law." We've chosen 'case law' for this rule.

[8] **Drafters' Note**: See footnote 6.

[9] **Consultant's Note**: Subparagraph (A)(2) addresses when a lawyer participating in the program is disqualified because the personal disqualification of another lawyer in the lawyer's firm is imputed to the participating lawyer. Because the current California rules do not contain a rule concerning imputation, I've added only disqualification to this subparagraph. *Cf.* paragraph (A)(1) ("is subject to discipline and disqualification"). Note that the imputed disqualification addressed in paragraph (A)(2) runs from the law firm to the participating lawyer. Paragraph (B) addresses the situation of disqualification running from the participating lawyer to the law firm.

[10] **Drafters' Note**: Because the convention in the current California Rules is to refer to "law firm," we've substituted "law firm" for "firm" throughout this rule.

[11] **Consultant's Note**: Although (A)(2) is concerned with imputed disqualification, it is the imputed disqualification of the participating lawyer (by virtue of another lawyer in the law firm being personally disqualified), not the imputation of the participating lawyer's personal disqualification to the law firm. Therefore, I've substituted "rule 3-310 or case law relating to conflicts of interest" for "Rules 1.7 and 1.9(a)." See also footnotes 5 and 6 for an explanation of why I believe the phrase "Rules 1.7 and 1.9(a)" refer to a lawyer's personal disqualication.

[12] **Consultant's Note**: See footnote 9. As already noted, paragraph (B) addresses the imputation of a personal conflict of the lawyer participating in the program (e.g., the lawyer has obtained confidential client information), back to the lawyer's law firm. See MR 6.5, Cmt. [4] ("By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the

~~Comment~~Discussion

[1][15] ~~Legal services organizations, courts~~ Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a ~~client-lawyer~~lawyer-client relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. ~~See, e.g., Rules 1.7, 1.9 and 1.10.~~

[2] A ~~lawyer~~ member who provides short-term limited legal services pursuant to ~~this Rule~~ rule 1-650 must secure the client's informed consent to the limited scope of the representation. ~~See Rule 1.2(c).~~ If a short-term limited representation would not be reasonable under the circumstances, the ~~lawyer~~ member may offer advice to the client but must also advise the client of the need for further assistance of counsel. See rule 3-110.[16] Except as provided in this ~~Rule~~rule 1-650,[17] the Rules of Professional Conduct

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lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices.")

In addition, paragraph (B) operates to avoid the personal disqualification of ***another*** lawyer who is participating in the program (e.g., from an entirely different law firm) from being imputed to the participating lawyer. See Comment [4] ("Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.")

[13] **Drafters' Note**: The phrase, "except as provided in paragraph (a)(2)," signals to the reader that the doctrine of imputed conflicts applies to a participating lawyer only under the conditions outlined in paragraph (a)(2), i.e., when the participating lawyer ***knows*** that another lawyer associated with the lawyer in his or her law firm is personally disqualified under either 3-310 or case law related to conflicts of interest.

[14] **Consultant's Note**: I'm not sure whether to refer to imputed disqualification as "the doctrine of," "the principle of," or refer to "case law related to imputed conflicts of interest." My preference is probably the latter to maintain consistency with the earlier "case law relating to conflicts of interest."

[15] **Consultant's Note**: I don't see any reason not to adopt MR 6.5, cmt. [1], with only the substitution of our laundry list of qualified sponsor organizations in the first sentence and the deletion of the cross-reference to ceratin rules at the end of the Comment.

[16] **Consultant's Note**: I recommend retention of the first two sentences of MR 6.5, cmt. [2], as revised. Notwithstanding the brevity of the typical lawyer-client communication under this rule, there is no reason why the program client should not be given the opportunity to withhold informed consent as provided in the first sentence. In addition, in those situations where the lawyer cannot competently give substantive advice on the matter absent an ongoing representation, the second sentence provides important guidance on advising the program client to seek further legal assistance. I've also added a reference to rule 3-110.

and the State Bar Act, including ~~Rules 1.6 and 1.9(c)~~the member's duty of confidentiality under Business and Professions Code § 6068(e)(1),[18] are applicable to the limited representation.

[3] ~~Because a~~A ~~lawyer~~ member who is representing a client in the circumstances addressed by ~~this Rule~~rule 1-650 ordinarily is not able to check systematically for conflicts of interest~~,~~. Therefore, paragraph (~~a~~A)(1) requires compliance with ~~Rules~~ rule ~~1.7 or 1.9(a)~~ 3-310 and case law relating to conflicts of interest only if the ~~lawyer~~ member knows that the representation presents a conflict of interest for the ~~lawyer~~member~~,~~. ~~and~~ In addition, paragraph (A)(2) requires compliance with ~~Rule 1.10~~case law relating to imputed conflicts of interest only if the ~~lawyer~~ member knows that another lawyer in the ~~lawyer's~~ member's law firm is disqualified by ~~Rules~~ rule ~~1.7 or 1.9(a)~~3-310 or case law relating to conflicts of interest in the matter.[19]

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the ~~lawyer's~~ member's law firm, paragraph (~~b~~B) provides that ~~Rule 1.10~~case law relating to imputed conflicts of interest[20] is inapplicable to a representation governed by this ~~Rule~~ rule except as provided by paragraph (~~a~~A)(2). Paragraph (~~a~~A)(2) requires the participating ~~lawyer~~ member to comply with ~~Rule 1.10~~ case law relating to imputed conflicts of interest[21] when the lawyer knows that any lawyer in[22] the ~~lawyer's~~ member's law firm is disqualified by ~~Rules~~ rule~~1.7 or 1.9(a)~~ 3-310 or case law relating to conflicts of interest. By virtue of paragraph (~~b~~B), moreover , a ~~lawyer's~~ member's participation in a short-term limited legal services program will not be imputed to the member's law firm or[23] preclude the ~~lawyer's~~ member's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.[24]

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[17] **Drafters' Note**: The convention for the current California Rules is to refer to the rule by its number, not "this rule" or "this Rule." Note also that referring to "this rule [number]" is a convention also found in the current rules.

[18] **Drafters' Note**: MR 1.6 and 1.9 concern a lawyer's duty of confidentiality to current and former clients, respectively. Accordingly, we've substituted the reference to the State Bar Act and B&P Code § 6068(e).

[19] **Consultant's Note**: I've revised MR 6.5, cmt. [3] to conform to the phrases I substituted previously in the rule itself. I also tweaked it a bit to clarify when (A)(1) applies and when (A)(2) applies.

[20] See footnote 14.

[21] See footnote 14.

[22] **Consultant's Note**: I thought adding the phrase, "any lawyer in" would be a clarifying change.

[23] Consultant's Note: I've added the clause, "be imputed to the lawyer's law firm" to connect the dots that the reason the law firm is not precluded from its representations of an person adverse to a program client is because the doctrine of imputed disqualification is not applicable.

[24] See footnote 12, second paragraph.

[5] If, after commencing a short-term limited representation in accordance with ~~this Rule~~rule 1-650, a ~~lawyer member~~ undertakes to represent the client in the matter on an ongoing basis, ~~Rules 1.7, 1.9(a) and 1.10~~rule 3-310 and case law relating to conflicts of interest and imputed conflicts of interest become applicable.

Enclosure 2

Proposed Rule 1-650 [6.5] – ALT #2
(without reference to Disqualification)

- **Clean Version**
- **Annotated Version w/ Explanatory Footnotes**
- **Redline Version, Compared to ABA Model Rule 6.5**

Rule 1-650 [6.5] Limited Legal Services Programs

(A) A member who, under the auspices of a program sponsored by a court, government agency, bar association, law school, nonprofit organization, or a qualified legal services project within the meaning of Business and Professions Code § 6213(a) provides short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation in the matter:

(1) is subject to rule 3-310 only if the member knows that the representation of the client involves a conflict of interest; and

(2) is subject to an imputed conflict of interest only if the member knows that another lawyer associated with the member in a law firm would be subject to a conflict of interest under rule 3-310 with respect to the matter.

(B) Except as provided in paragraph (A)(2), a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm.

Discussion

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a lawyer-client relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited scope of the representation. If a short-term limited representation would not be reasonable under the circumstances, the member may offer advice to the client but must also advise the client of the need for further assistance of counsel. See rule 3-110. Except as provided in this rule 1-650, the Rules of Professional Conduct and the State Bar Act, including the member's duty of confidentiality under Business and Professions Code § 6068(e)(1), are applicable to the limited representation.

[3] A member who is representing a client in the circumstances addressed by rule 1-650 ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (A)(1) requires compliance with rule 3-310 only if the member knows that the representation presents a conflict of interest for the member. In addition, paragraph

(A)(2) subjects the member to imputed conflicts of interest only if the member knows that another lawyer in the member's law firm is disqualified by rule 3-310.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the member's law firm, paragraph (B) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (A)(2). Paragraph (A)(2) makes the participating member subject to imputed conflicts of interest when the lawyer knows that any lawyer in the member's law firm is disqualified by rule 3-310. By virtue of paragraph (B), moreover, a member's participation in a short-term limited legal services program will not be imputed to the member's law firm or preclude the member's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with rule 1-650, a member undertakes to represent the client in the matter on an ongoing basis, rule 3-310 and all other rules become applicable.

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Rule 1-650[1] [6.5] [2]Limited Legal Services Programs

(A) A member who, under the auspices of a program sponsored by a court, government agency, bar association, law school, nonprofit organization,[3] or a qualified legal services project within the meaning of Business and Professions Code § 6213(a) [4] provides short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation in the matter:

(1) is subject to rule 3-310[5] only if the member knows that the representation of the client involves a conflict of interest; and

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[1] **Drafters' Note**: The drafters recommend using the number 1-650, so that the rule follows current rule 1-600 ("Legal Services Programs").

[2] **Drafters' Note**: Because the sponsors of qualifying programs are not limited to nonprofits or courts, we have deleted "Nonprofit and Court-Annexed" from the Model Rule title.

[3] **Drafters' Note**: At the 2/20/09 meeting, the RRC voted 11-0-1 to add this laundry list of organizations qualified to sponsor the programs this rule covers. See 2/20/09 KEM Meeting Notes, III.H., at ¶.8.

[4] **Drafters' Note**: Although we were requested during the meeting to refer to B&P Code §§ 6210 et seq., that citation could be confusing, as those sections are addressed to "Funds For The Provision Of Legal Services To Indigent Persons". Perhaps the better reference is § 6213(a), which provides:

> (a) "Qualified legal services project" means either of the following:
>
> (1) A nonprofit project incorporated and operated exclusively in California which provides as its primary purpose and function legal services without charge to indigent persons and which has quality control procedures approved by the State Bar of California.
>
> (2) A program operated exclusively in California by a nonprofit law school accredited by the State Bar of California which meets the requirements of subparagraphs (A) and (B).
>
> (A) The program shall have operated for at least two years at a cost of at least twenty thousand dollars ($20,000) per year as an identifiable law school unit with a primary purpose and function of providing legal services without charge to indigent persons.
>
> (B) The program shall have quality control procedures approved by the State Bar of California.

[5] **Consultant's Note**: In California, rule 3-310(C) and 3-310(B) cover, at least in part, the conflicts addressed in MR 1.7. California does not have CR 3-310(C)(4), which would cover much (but not all) of the balance MR 1.7.

The last iteration of the phantom rule 3-310(C)(4) [and corresponding amendment to rule 3-310(C)(3)] would have provided:

> (C) A member shall not, without the informed written consent of each client:
>
> * * *
>
> (3) ~~Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.~~ Accept representation of a person or entity the member knows or

(2) is subject to an imputed conflict of interest[6] only if the member knows that another lawyer associated with the member in a law firm[7] would be subject to a conflict of interest under rule 3-310 with respect to the matter.

(B)[8] Except as provided in paragraph (A)(2),[9] a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm.

Discussion

[1][10] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se

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reasonably should know is an opposing party to a client in a separate matter in which the member or the member's law firm currently represents the client.

(4) Accept representation of a person or entity in a litigation matter in which the member knows or reasonably should know an opposing party is a client of the member or the member's law firm, except as otherwise permitted or required by law.

See 1998 Rule Amendment proposal, available at: http://calbar.ca.gov/calbar/html_unclassified/3cp9805.html

[6] **Drafters' Note**: Subparagraph (A)(2) addresses when a lawyer participating in the program is disqualified because the personal disqualification of another lawyer in the lawyer's firm is imputed to the participating lawyer. Note that the imputed disqualification addressed in paragraph (A)(2) runs from the law firm to the participating lawyer. Paragraph (B) addresses the situation of disqualification running from the participating lawyer to the law firm.

[7] **Drafters' Note**: Because the convention in the current California Rules is to refer to "law firm," we've substituted "law firm" for "firm" throughout this rule.

[8] **Consultant's Note**: See footnote 6. As already noted, paragraph (B) addresses the imputation of a personal conflict of the lawyer participating in the program (e.g., the lawyer has obtained confidential client information), back to the lawyer's law firm. See MR 6.5, Cmt. [4] ("By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices.")

In addition, paragraph (B) operates to avoid the personal disqualification of ***another*** lawyer who is participating in the program (e.g., from an entirely different law firm) from being imputed to the participating lawyer. See Comment [4] ("Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.")

[9] **Drafters' Note**: The phrase, "except as provided in paragraph (a)(2)," signals to the reader that the doctrine of imputed conflicts applies to a participating lawyer only under the conditions outlined in paragraph (a)(2), i.e., when the participating lawyer ***knows*** that another lawyer associated with the lawyer in his or her law firm is personally disqualified under rule 3-310.

[10] **Consultant's Note**: I don't see any reason not to adopt MR 6.5, cmt. [1], with only the substitution of our laundry list of qualified sponsor organizations in the first sentence and the deletion of the cross-reference to ceratin rules at the end of the Comment.

counseling programs, a lawyer-client relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited scope of the representation. If a short-term limited representation would not be reasonable under the circumstances, the member may offer advice to the client but must also advise the client of the need for further assistance of counsel. See rule 3-110.[11] Except as provided in this rule 1-650,[12] the Rules of Professional Conduct and the State Bar Act, including the member's duty of confidentiality under Business and Professions Code § 6068(e)(1),[13] are applicable to the limited representation.

[3] A member who is representing a client in the circumstances addressed by rule 1-650 ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (A)(1) requires compliance with rule 3-310 only if the member knows that the representation presents a conflict of interest for the member. In addition, paragraph (A)(2) subjects the member to imputed conflicts of interest only if the member knows that another lawyer in the member's law firm is disqualified by rule 3-310.[14]

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the member's law firm, paragraph (B) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (A)(2). Paragraph (A)(2) makes the participating member subject to imputed conflicts of interest when the member knows that any lawyer in[15] the member's law firm is disqualified by rule 3-310. By virtue of paragraph (B), moreover , a member's participation in a short-

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[11] **Consultant's Note**: I recommend retention of the first two sentences of MR 6.5, cmt. [2], as revised. Notwithstanding the brevity of the typical lawyer-client communication under this rule, there is no reason why the program client should not be given the opportunity to withhold informed consent as provided in the first sentence. In addition, in those situations where the lawyer cannot competently give substantive advice on the matter absent an ongoing representation, the second sentence provides important guidance on advising the program client to seek further legal assistance. I've also added a reference to rule 3-110.

[12] **Drafters' Note**: The convention for the current California Rules is to refer to the rule by its number, not "this rule" or "this Rule." Note also that referring to "this rule [number]" is a convention also found in the current rules.

[13] **Drafters' Note**: MR 1.6 and 1.9 concern a lawyer's duty of confidentiality to current and former clients, respectively. Accordingly, we've substituted the reference to the State Bar Act and B&P Code § 6068(e).

[14] **Consultant's Note**: I've revised MR 6.5, cmt. [3] to conform to the phrases I substituted previously in the rule itself. I also tweaked it a bit to clarify when (A)(1) applies and when (A)(2) applies.

[15] **Consultant's Note**: I thought adding the phrase, "any lawyer in" would be a clarifying change.

term limited legal services program will not be imputed to the member's law firm or[16] preclude the member's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.[17]

[5] If, after commencing a short-term limited representation in accordance with rule 1-650, a member undertakes to represent the client in the matter on an ongoing basis, rule 3-310 and all other rules become applicable.

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[16] Consultant's Note: I've added the clause, "be imputed to the lawyer's law firm" to connect the dots that the reason the law firm is not precluded from its representations of an person adverse to a program client is because the doctrine of imputed disqualification is not applicable.

[17] See footnote 8, second paragraph.

Rule 1-650[1] [6.5] [2]Limited Legal Services Programs

(A) A member who, under the auspices of a program sponsored by a court, government agency, bar association, law school, nonprofit organization,[3] or a qualified legal services project within the meaning of Business and Professions Code § 6213(a) [4] provides short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation in the matter:

(1) is subject to rule 3-310[5] only if the member knows that the representation of the client involves a conflict of interest; and

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[1] **Drafters' Note**: The drafters recommend using the number 1-650, so that the rule follows current rule 1-600 ("Legal Services Programs").

[2] **Drafters' Note**: Because the sponsors of qualifying programs are not limited to nonprofits or courts, we have deleted "Nonprofit and Court-Annexed" from the Model Rule title.

[3] **Drafters' Note**: At the 2/20/09 meeting, the RRC voted 11-0-1 to add this laundry list of organizations qualified to sponsor the programs this rule covers. See 2/20/09 KEM Meeting Notes, III.H., at ¶.8.

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> (a) "Qualified legal services project" means either of the following:
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> (A) The program shall have operated for at least two years at a cost of at least twenty thousand dollars ($20,000) per year as an identifiable law school unit with a primary purpose and function of providing legal services without charge to indigent persons.
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[5] **Consultant's Note**: In California, rule 3-310(C) and 3-310(B) cover, at least in part, the conflicts addressed in MR 1.7. California does not have CR 3-310(C)(4), which would cover much (but not all) of the balance MR 1.7.

The last iteration of the phantom rule 3-310(C)(4) [and corresponding amendment to rule 3-310(C)(3)] would have provided:

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> (3) ~~Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.~~ Accept representation of a person or entity the member knows or

(2) is subject to an imputed conflict of interest[6] only if the member knows that another lawyer associated with the member in a law firm[7] ~~is disqualified by~~ would be subject to a conflict of interest under rule 3-310 with respect to the matter.

(B)[8] Except as provided in paragraph (A)(2),[9] a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm.

Discussion

[1][10] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons to address their legal problems without further representation by a

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reasonably should know is an opposing party to a client in a separate matter in which the member or the member's law firm currently represents the client.

(4) Accept representation of a person or entity in a litigation matter in which the member knows or reasonably should know an opposing party is a client of the member or the member's law firm, except as otherwise permitted or required by law.

See 1998 Rule Amendment proposal, available at:
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[6] **Drafters' Note**: Subparagraph (A)(2) addresses when a lawyer participating in the program is disqualified because the personal disqualification of another lawyer in the lawyer's firm is imputed to the participating lawyer. Note that the imputed disqualification addressed in paragraph (A)(2) runs from the law firm to the participating lawyer. Paragraph (B) addresses the situation of disqualification running from the participating lawyer to the law firm.

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In addition, paragraph (B) operates to avoid the personal disqualification of ***another*** lawyer who is participating in the program (e.g., from an entirely different law firm) from being imputed to the participating lawyer. See Comment [4] ("Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.")

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lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a lawyer-client relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited scope of the representation. If a short-term limited representation would not be reasonable under the circumstances, the member may offer advice to the client but must also advise the client of the need for further assistance of counsel. See rule 3-110.[11] Except as provided in this rule 1-650,[12] the Rules of Professional Conduct and the State Bar Act, including the member's duty of confidentiality under Business and Professions Code § 6068(e)(1),[13] are applicable to the limited representation.

[3] A member who is representing a client in the circumstances addressed by rule 1-650 ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (A)(1) requires compliance with rule 3-310 only if the member knows that the representation presents a conflict of interest for the member. In addition, paragraph (A)(2) subjects the member to imputed conflicts of interest only if the member knows that another lawyer in the member's law firm is disqualified by rule 3-310.[14]

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the member's law firm, paragraph (B) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (A)(2). Paragraph (A)(2) makes the participating member subject to imputed conflicts of interest when the member knows that any lawyer in[15] the member's law firm is disqualified by rule 3-310. By virtue of paragraph (B), moreover , a member's participation in a short-

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[11] **Consultant's Note**: I recommend retention of the first two sentences of MR 6.5, cmt. [2], as revised. Notwithstanding the brevity of the typical lawyer-client communication under this rule, there is no reason why the program client should not be given the opportunity to withhold informed consent as provided in the first sentence. In addition, in those situations where the lawyer cannot competently give substantive advice on the matter absent an ongoing representation, the second sentence provides important guidance on advising the program client to seek further legal assistance. I've also added a reference to rule 3-110.

[12] **Drafters' Note**: The convention for the current California Rules is to refer to the rule by its number, not "this rule" or "this Rule." Note also that referring to "this rule [number]" is a convention also found in the current rules.

[13] **Drafters' Note**: MR 1.6 and 1.9 concern a lawyer's duty of confidentiality to current and former clients, respectively. Accordingly, we've substituted the reference to the State Bar Act and B&P Code § 6068(e).

[14] **Consultant's Note**: I've revised MR 6.5, cmt. [3] to conform to the phrases I substituted previously in the rule itself. I also tweaked it a bit to clarify when (A)(1) applies and when (A)(2) applies.

[15] **Consultant's Note**: I thought adding the phrase, "any lawyer in" would be a clarifying change.

term limited legal services program will not be imputed to the member's law firm or[16] preclude the member's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.[17]

[5] If, after commencing a short-term limited representation in accordance with rule 1-650, a member undertakes to represent the client in the matter on an ongoing basis, rule 3-310 and all other rules become applicable.

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[16] Consultant's Note: I've added the clause, "be imputed to the lawyer's law firm" to connect the dots that the reason the law firm is not precluded from its representations of an person adverse to a program client is because the doctrine of imputed disqualification is not applicable.

[17] See footnote 8, second paragraph.

Enclosure 3

Comprehensive Voting Tally Chart

RRC – Rule 1-650 [6.5] – Results of Five-Day Ballot (March 2, 2009)										
Member	**Alternative 1**				**Alternative 2**				**Time Concerns**[1]	**Legend**
	Rule		**Discussion**		**Rule**		**Discussion**			
	Approve	Object	**Approve**	Object	**Approve**	Object	**Approve**	Object		
Foy, Linda		X		X	**X**		**X**		[X]	Bold Font = Preferred
Julien, JoElla		X		X	**X**			X		
Kehr, Robert		X		X	**X**		**X**		[X]	Regular Font = Acceptable
Lamport, Stan		X		X	**X**		**X**			
Martinez, Raul		X		X	**X**		**X**			Brackets = Concerned
Melchior, Kurt	**X**			[X][2]	X			[X]		
Peck, Ellen	X		X		X		X			
Ruvolo, Ignazio		X		X		X		X	[X]	
Sapiro, Jerry		X		X	**X**		**X**		[X]	
Snyder, Dominique	X		X		X		X			
Sondheim, Harry	X		X		X		X			
Tuft, Mark		X		X	**X**		**X**		[X]	
Vapnek, Paul	**X**		**X**		X		X			
Voogd, Anthonie	–	–	–	–	–	–	–	–	–	
TOTALS (13 voters)	5 (2)	8	4 (1)	8	12 (7)	1	10 (6)	2	5	

[1] This column identifies members who expressed a concern with the brief amount of time given the Commission to craft a rule.
[2] Mr. Melchior expressed concern about two of the comments to the Rule (1 & 2). See 3/1/09 Melchior E-mail to RRC. It is not clear whether he objected to the comments *in toto*.

Enclosure 4

Compilation of E-mail Ballots

FIVE-DAY BALLOT E-MAILS:

February 26, 2009 Ruvolo E-mail to RRC:

I must object to each of the alternative rules suggested.

I have watched with great empathy and anguish as colleagues with whom I have worked on this commission for more than a half-dozen years, have worked virtually non-stop this week trying to craft an "emergency" rule which has not been requested, as far as I know, as the result of any BOG vote. I make no judgment as to the need for such a rule produced on such an exigent basis, nor the worthiness of the interest it seeks to serve. Instead, I am simply against ad hoc rule-making under these circumstances unless the request comes directly from a majority of the BOG or the Supreme Court itself. Furthermore, I have grave concern that this rule, which purports to allow an exception to the conflict of interest rule, has not undergone the scrutiny and debate to which all other rules have been subjected.

That said, I must express my thanks and appreciation to Harry, Kevin, Randy, Raul, Paul, and Jerry for the many hours they have spent. One has only to read the avalanche of frenetic emails among the drafting team members and commission leadership to sense the pressure they have had to endure while trying to draft this rule.

If the rule goes forward at this stage, I urge the second alternative be selected by those voting affirmatively for the rule. Also, the discussion should be forwarded to the BOG as well.

February 27, 2009 Julien E-mail to RRC:

First, I vote for sending it out without the discussion in both versions. I make this choice in the interest of democracy. Since we voted at the meeting to send out without the discussion, I think that it would be withheld until a later date.

With respect to the versions, I vote in favor of alternate #2 because of its simplicity.

I do, however, have two questions:

#1 In A(2) does "law firm: mean the member's "law firm"? If so shouldn't it say the law firm to indicate that it is talking about the member in question rather than "a law firm"?

#2 Why should we talk about disqualification if we are writing rules of discipline? Shouldn't we stick only to the discipline issue and leave the disqualification to the judge? This wording in alternative #1 gives me another reason to vote against it on this basis.

February 27, 2009 Kehr E-mail to RRC:

I vote in favor of Alt 2 and, with less enthusiasm, in favor of its Discussion.

I vote against Alt 1 b/c I don't believe we should include any reference to disqualification without finalizing the Commission's decisions on Rule 1.10(c) and (d). Any reference to disqualification would be a significant substantive change that I don't think should be handled without full consideration even though rule 1-650 would be an interim rule if adopted by the Court. Also, and independently, I vote against Alt 1 b/c of its paragraph (A) reference to case law. Case law

is so varied and fact specific, and disqualification so often seems to include a judge's weighing of unexpressed factors, that I think any attempt to encompass case law would make the meaning of paragraph (A) quite unpredictable. That is not a direction in which I would want to go without much more careful consideration than is possible now. My strong preference would be to not even submit Alt 1 to the BOG.

Although I take these offerings as not being subject to drafting suggestions b/c of the extremely limited time available, I do want to point out that the current Discussion style does not include paragraph numbers, but these drafts retain the MR style of bracketed numbering.

My thanks to the drafting team for having pulled this together so well and so quickly.

February 28, 2009 Sondheim E-mail to RRC:

A few of you have voted regarding this rule, but most have not. FIRST, I URGE YOU TO VOTE. SECOND, YOU CAN VOTE IN FAVOR OF BOTH RULES, IN FAVOR OF ONE RULE AND REJECT THE OTHER RULE OR REJECT BOTH RULES.

I am voting in favor of both rules because I believe there are valid reasons for each rule and because I believe the BOG should make the final decision as to which rule will best serve the purposes for which we were requested to draft a rule. Some of the correspondence in favor of, or opposed to, each rule is set forth below.

I am sorry that this correspondence is not as concise and in better order, but I have just a little time today to send this to all of you and hope it is of some assistance.

I am also voting in favor of including the comments for each rule because I believe the purpose of the rule will be better served by the clarification set forth in the comments. The original vote on comments at our meeting was close (6-5-1) and upon further reflection I believe we need to make our decision in light of what the comments now say as distinguished from the vacuum which existed when there were no comments before us.

Editor's Note: The following e-mails were pasted into the Chair's e-mail:

February 24, 2009 Vapnek E-mail to Sondheim, cc Drafters & Staff:
February 24, 2009 Martinez E-mail to Vapnek, cc Chair, Drafters & Staff:
February 24, 2009 Martinez E-mail to Difuntorum, cc Drafters, Chair & Staff:
February 24, 2009 Sondheim E-mail to Vapnek, Difuntorum & KEM, cc Drafters & McCurdy:
February 24, 2009 Sondheim E-mail to Martinez, cc Drafters & Staff:
February 24, 2009 KEM E-mail to Vapnek, cc Chair & Difuntorum:
February 25, 2009 Martinez E-mail to Drafters, cc Chair & Staff:
February 25, 2009 Difuntorum E-mail to Drafters, cc Chair & KEM:

February 28, 2009 Martinez E-mail to RRC:

Harry's first e-mail may have lost some formatting attributes contained in the e-mails he copied and pasted. One of the e-mails had Kevin's response to one of my e-mails interspersed in bold. I am attaching the entire e-mail compilation prepared by Kevin, recognizing that the relevant exchanges on the issue Harry refers to occurred on 2-24 and 2-25. I favor Alt2 and against sending ALT1 to the Board at all. I approve sending the discussion to the Board in concept (for

the reasons Harry has outlined), but am troubled that the Commission voted to submit a rule without comments at the last meeting and we are now reversing gears via mail ballot, which raises procedural concerns going forward. However, I think the emergency nature of this exercise justifies the mail ballot approach on this occasion.

February 28, 2009 Peck E-mail to RRC:

For all of the reasons Harry has stated and more, I am in favor of both rules and in favor of sending the comments for each rule to the Board of Governors.

February 28, 2009 Sapiro E-mail to RRC List:

I vote in favor of ALT2 and in favor of adopting its discussion.

If my recollection is correct, I voted against adopting the rule at the last meeting. I did so because I do not like being forced to adopt a disciplinary rule without exercising our usual care. We should not recommend that the Board or the Supreme Court adopt or amend a rule unless we have thoroughly considered it, its wording, and its actual and potential consequences. Adopting a rule may help or hurt lawyers individually and as a profession and may help or hurt the public. Not taking the time for careful deliberation may cause unintended consequences or consequences that we would have been able to anticipate if we acted with deliberation. In addition, not exposing it to public comment or only having a brief comment period will deprive us of the opportunity to receive constructive criticism.

Having said that, I can live with ALT2 as a temporary measure, on the assumption that we will consider it more deliberately at a later date. I believe it and its discussion can be improved. Kevin, Paul and Raul did improve it, but some aspects of it would have benefitted if they had had more time.

I vote against ALT1 and its discussion because of its references to disqualification and its overbroad references to case law. Courts should not be constrained by a rule of professional conduct when they grant or deny a particular motion to disqualify a lawyer. The rules are only part of the equation. Conversely, case law on disqualification is too fact specific and too diverse to be a basis for discipline or the lack of discipline.

February 28, 2009 Sapiro E-mail to RRC (response to 2/28/09 Martinez E-mail):

I think Raul is correct about the vote not to include the comment. However, in this case I think the comment, nee discussion, is needed [sorry about the bad play on words] for the rule to be understood.

February 28, 2009 Vapnek E-mail to RRC:

My vote is to approve both versions with the Discussion for each. I prefer Alt 1, but could live with Alt 2. Each should have the Discussion material along with the rule.

As you know, this was an emergency request relayed to the Commission at our last meeting on the 20th. As a result, there was little time for extended review or consideration of the ramifications and effects of language that could very well have been improved had there been more time. In any event, we were asked to come up with a version of Model Rule 6.5 for submission to RAD and then via the BOG to the Supreme Court in order to address a

particularly troubling issue: the concerns of the management of many law firms and their lawyers, as well as other lawyers who want to volunteer to help legal aid providers but who are concerned that this pro bono service could result in disqualification of the lawyers and their firms from continued representation of some of their major clients. That is all we (the drafting committee) understood we were to do.

Alternate 1 is essentially MR 6.5 modified to delete references to other Model Rules and edited to conform to conventional California drafting style. The addition of "discipline and disqualification" and the references to rule 3-310 and case law was to make explicit what we were trying to do: craft a rule that would, if the Supreme Court adopts it, make it clear to volunteers that they would not be disqualified should they follow the rule's provisions when they volunteer for any such program as is covered by the rule. We even broadened the rule to permit for-profit groups with legal aid programs to be coverd by the rule.

Some of our colleagues have objected to such an explicit declaration (if that's the right word) that the rule spells out to the lower courts, especially the superior courts, that they are not to disqualify a lawyer and his or her firm if the rule is followed. I think the Supreme Court has the power to do exactly that, and can do it by a rule of professional conduct. That, as I understand the issue we were asked to address, is what our friends in the legal aid bar are asking for. In response to those objections, we drafted Alternate 2 that eliminates the references to discipline and disqualification in the rule, leaving the message to be found in the discussion. My personal view is that Alt 1 serves lawyers and the legal aid programs better, but I can live with Alt 2; however, it is also my view that the discussion in both alternative drafts is essential to understanding the rule.

In response to his specific request for a status report, I sent a copy of the ballot material to Toby Rothschild. For what it is worth to the Commission, he emailed me that if he had a vote he "would vote yes on everything..." He also said, "I like the simplicity and clarity of version 2, but I think I prefer the completeness of version 1. The reference to the case law relating to conflict of interest in the (A)(2) situation makes clearer that it is not just discipline but also disqualification that is at issue." He also said that "as to the comments, I favor including the comments. It helps make the pruposes of the rule clearer."

March 1, 2009 Snyder E-mail to Chair, cc Staff:

I don't know if I should be voting since I am still on leave. If I may, however, I would vote for both versions and both comments and let the BOG decide which they favor from a policy standpoint. If I should not be voting, then simply disregard this message.

March 1, 2009 Melchior E-mail to RRC:

I've read the emails. I vote to approve both versions OF THE RULE but prefer version I because it gives clearer notice to the profession and to the courts of what this rule intends. One concern: the rule imposes a knowledge standard: "if the lawyer knows" (both in A 1 and A 2). Can we be sure that everyone, including judges and OCTC, will understand that this means actual personal knowledge, and not some ideas or versions of imputed knowledge? If there is concern about the latter, we could add the word "personally" before "knows" both times.

As to the Comments, my main concern is about the informed consent requirement. Practically, I don't see how this could work in many of the contemplated situations. Take what I think is a

typical situation: a lawyer volunteers to man a help desk at a walk in clinic. Someone walks in and has a problem with some large lender. What the client wants -- at least immediately -- is advice about how to respond to some dunning notice. The lawyer does not personally work for the lender, and expects to tell the walk-in how to write a response, or maybe the lawyer writes the response for this person then and there. That would clearly be allowed by this Rule. We propose to say in Comment 2 [and the ABA led the way on this] that informed consent is required for this scenario.

I think that overbureaucratizes this situation beyond any utility. "Informed" consent must be in writing, and it must explain the current conflicts and probable consequences of the situation. Sure: the lawyer can orally explain to the walk-in that the lawyer will meet with that person only this one evening, will help the person only with the one letter, will not represent her in future dealings with the lender, etc. But when and how could there be a timely, preceding writing explaining all of this, in a manner adequate to meet the current 3-310(A) standards?

And Comment 1 adds nothing of value to any reader's understanding -- just the usual ABA explanatory treatise.

March 1, 2009 Tuft E-mail to RRC List:

Both versions of proposed rule 1-650 have problems and deserve our further attention before either alternative is sent to RAD. Understanding the need for urgency and the emmergency request relayed to us at our February 20th meeting, I reluctanctly approve Alternative 2 with the Discussion for submission to RAD. I object to Alternative 1 even with the Discussion.

I offer the following suggestions regarding Alternative 2, which hopefully can be considered without delaying the process.

1. The intended protection afforded the member under paragraphs (A)(1) and (A)(2) could come closer to the Model Rule by adding the phrase "or case law relating to conflicts of interest" after "rule 3-310." This would cover, at least, the missing (C)(4) situation. Without including the reference to case law, the rule will not reach the kinds of conflict situations that concern many lawyers considering providing short term limited legal services under an approved program.

2. The last sentence in proposed paragraph [3] of the Discussion should be modified by adding the following phrase after "rule 3-310" on line 49: or case law relating to conflicts of interest."

3. If the changes to paragraphs (A)(1) and (A)(2) are made, the following phrase should be added on line 57 at the end of the second sentence in paragraph [4] of the Discussion after "rule 3-310:" "or case law relating to conflicts of interest."

4. The word "moreover" in paragraph [4] on line 57 should be changed to " however."

5. The end of the sentence in paragraph [5] on line 66 should read: "rule 3-310 and the case law relating to imputed conflicts of interest becomes applicable"

March 2, 2009 Foy E-mail to RRC:

Based upon (1) the reasons stated in Bob Kehr's 2/27 6:44 pm email and Raul Martinez's 2/24 5:37pm email re avoiding references to d/q and discipline in the rule, and notwithstanding

Kevin's thorough and careful response to Raul, and (2) the general approach of treating the language of the ABA Model Rule as the starting point/default and requiring justification for departures therefrom, I vote in favor of Alt 2 and the Comments thereto and against Alt 1 and its corresponding Comments.

Our deliberations on this emergency rule and the entire drafting and intra-Commission discussion has been so compressed, so divorced from our treatment of other rules and so anomalous that I am very reluctant to vote in favor of a rule that expressly references d/q, even if it doesn't provide a "free pass."

March 2, 2009 Lamport E-mail to RRC:

If something has to go to the Board, I very reluctantly vote for Alt 2, both Rule and Discussion.

Having said that I believe Alt 2 should be revised along the lines suggested below.

This is a rule that will be plugged into our current rules, which are not based on the Model Rules. Starting from a Model Rule template does not work. There is no imputation in our current rules. In Formal Opinion 1998-152, COPRAC clearly explained that the imputed knowledge rule (in the context of Rule 3-310(E)) is not part of the Rules of Professional Conduct. It is an evidentiary standard created for use in disqualification motions. While the conflict rules in the California Rules of Professional Conduct are used in disqualification proceedings, they are not written to be disqualification rules, nor should they be. The experience in other jurisdictions shows that drafting disciplinary rules around disqualification rules and presumptions results in applications of the rules in dictionary and malpractice settings that do not advance public protection and produce results that are disconnected from the underlying principles that govern what a conflict of interest is.

I will support an imputed knowledge rule in our rules when the time comes, but to add the concept now when it is not in our rules now makes this rule a non sequitur. I would support something in (A)(1) along the lines of "is subject to rule 3-310 only if the member knows that the representation would require compliance with that rule." I think that formulation would be broad enough to encompass imputed knowledge without getting into a discussion about imputed knowledge or disqualification. If it is necessary to drive the point home, we could add either in the Discussion or in (A)(2) that a member is not required to determine whether there are circumstances involving the member's law firm or another lawyer in the member's law firm that would require compliance with rule 3-310. We could revise (B) say "Except in the circumstances described in paragraph (A)(1), a member is not required to comply with rule 3-310 when another lawyer in the member's law firm has rendered legal services as provided in paragraph (A)." There would need to be corresponding changes in Discussion paragraphs 3 and 4.